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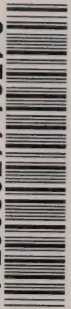
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Reasons for Decision

Trans-Northern Pipelines Inc.

MH-3-2000



November 2000

Suspension of Service

National Energy Board

Reasons for Decision

In the Matter of

Trans-Northern Pipelines Inc.

Proposed Suspension of Service on the
Don Valley Lateral

MH-3-2000

November 2000

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represented by the National Energy Board

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Abbreviations

Act	<i>National Energy Board Act</i>
Board	National Energy Board
DVL	Don Valley Lateral
Enbridge	Enbridge Pipelines Inc.
MH-4-96	PanCanadian Petroleum Limited, Reasons for Decision dated February 1997
mm	millimetre
OH-2-96	Novagas Clearinghouse Pipelines Ltd., Reasons for Decision dated May 1997
OH-3-96	Federated Pipe Lines (Northern) Ltd., Reasons for Decision dated April 1997
PanCanadian	PanCanadian Petroleum Limited
Roy-L	Roy-L Canadian Fuels Co. Ltd.
TNPI	Trans-Northern Pipelines Inc.
TRCA	Toronto and Region Conservation Authority

Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* (Act) and the regulations made thereunder; and

IN THE MATTER OF an application by Trans-Northern Pipelines Inc. under section 71 of the Act for the proposed suspension of service on the Don Valley Lateral; and

IN THE MATTER OF the National Energy Board Hearing Order MH-3-2000;


HEARD at Richmond Hill, Ontario, on 24, 25 and 26 October 2000.

BEFORE:

J.S. Bulger	Presiding Member
J.-P. Théorêt	Member
C.L. Dybwad	Member

APPEARANCES:

J. Campion	Trans-Northern Pipelines Inc.
R. Alilovic	
G.M. Nettleton	Enbridge Pipelines Inc.
K. Miller	Roy-L Canadian Fuels Co. Ltd.
P. Enderwick	National Energy Board



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Chapter 1

Introduction

Trans-Northern Pipelines Inc. (TNPI) owns and operates a petroleum products pipeline system, over 800 kilometres in length, which extends from Nanticoke, Ontario to Montreal, Quebec, with various terminals along the system for the injection and delivery of product. The system includes five lateral pipelines extending from the mainline to terminals at Dorval, Mirabel and Pearson International Airports, Ottawa, Ontario and Toronto Harbour, Ontario. A map of the system appears in Figure 1-1. TNPI is owned in equal one-third shares by Petro-Canada Limited, Shell Canada Limited and Imperial Oil Ltd., which collectively ship the majority of throughput on the TNPI system.

TNPI is operating under an approved incentive toll settlement pursuant to Order TO-3-96. Under this agreement, earnings above a threshold of \$3.2 million are shared equally between TNPI's shareholders and its shippers. The shippers' share is distributed through reduced tolls for the following year.

On 15 February 2000, TNPI advised its shippers and the National Energy Board (Board) of plans to suspend deliveries on its lateral to Toronto Harbour, the Don Valley Lateral (DVL), effective 1 January 2001. The letter explained that this decision was necessitated by the steady decline in volumes on the DVL, which had placed this segment of the system in a "serious deficit position". By letter dated 11 May 2000, TNPI provided the Board with supporting information for its decision. TNPI submitted that the DVL was costing in excess of \$500,000 per year to operate while it generated only \$70,000 in revenue and that, while it was expecting these costs to escalate, there was no potential for increased revenues. TNPI advised that it intended to remove line fill from the lateral in January 2001 and fill it with nitrogen. It would then market the facilities to other utility operators and, if this was unsuccessful, apply to retire the facilities.

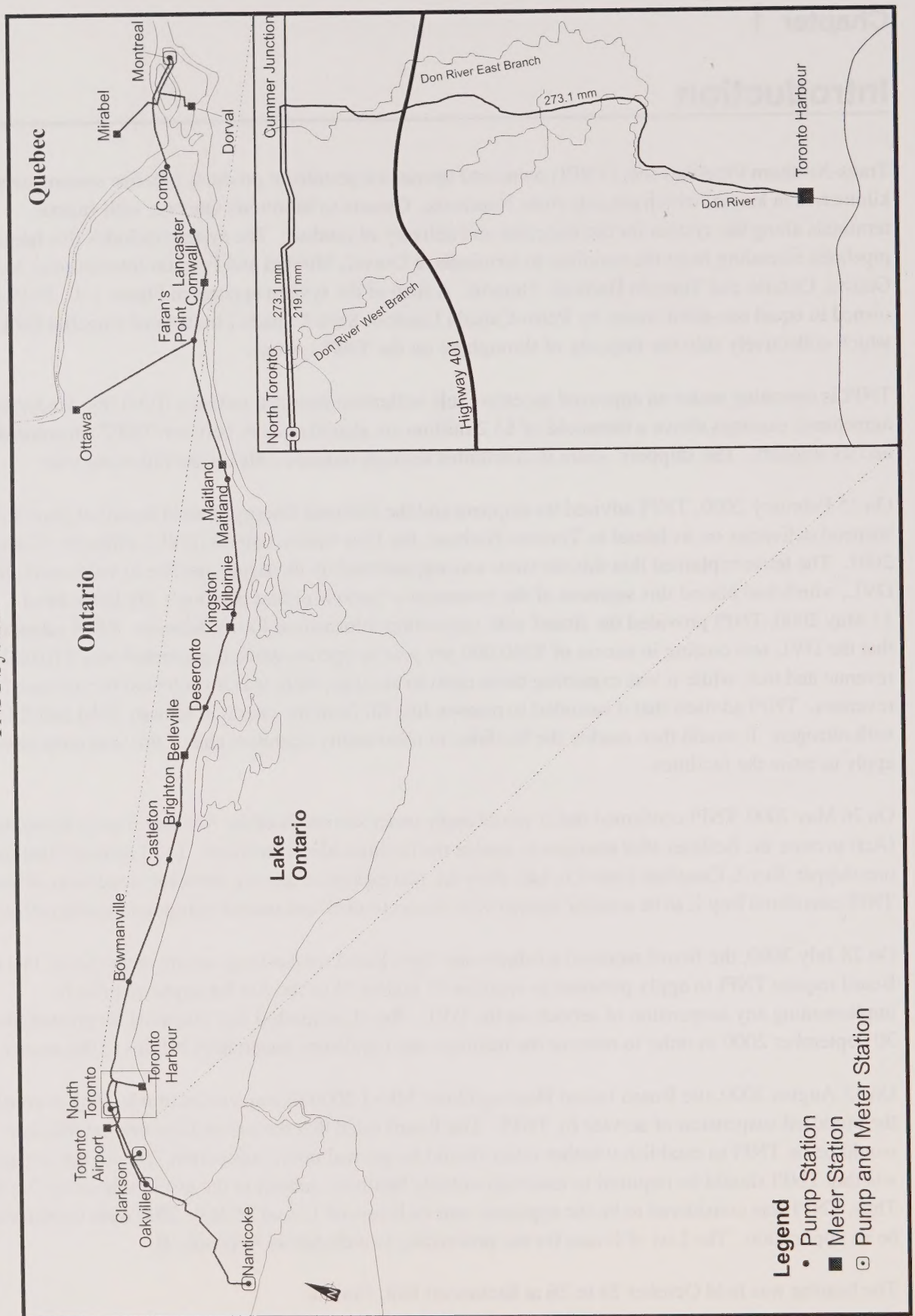
On 26 May 2000, TNPI confirmed that it would apply under section 74 of the *National Energy Board Act* (Act) to retire the facilities after attempts to market the facilities were concluded. TNPI indicated that only one shipper, Roy-L Canadian Fuels Co. Ltd. (Roy-L), had expressed concern about the suspension of service. TNPI considered Roy-L to be a minor shipper with access to truck and marine transportation alternatives.

On 28 July 2000, the Board received a submission from Roy-L requesting, among other things, that the Board require TNPI to apply pursuant to sections 71 and/or 74 of the Act for approval prior to implementing any suspension of service on the DVL. Roy-L requested that this relief be granted prior to 30 September 2000 in order to remove the business and regulatory uncertainty it faces in this matter.

On 15 August 2000, the Board issued Hearing Order MH-3-2000 to convene an oral hearing to consider the proposed suspension of service by TNPI. The Board ruled that the *prima facie* onus in this case would be on TNPI to establish whether relief should be granted under subsection 71(1) of the Act and whether TNPI should be required to maintain suitable facilities, subject to the test in subsection 71(3). Thus, TNPI was considered to be the applicant and its letters of 11 and 26 May 2000 were considered to be its application. The List of Issues for the proceeding is included as Appendix II.

The hearing was held October 24 to 26 at Richmond Hill, Ontario.

Figure 1-1
TNPI System



Chapter 2

Facilities

The DVL consists of 19.24 kilometres of 273.1 millimetre (mm) outside diameter pipeline extending from TNPI's mainline at Cummer Junction to its Toronto Harbour meter station, as shown in Figure 1-1. Products flow into Cummer Junction from the west via two pipelines extending from TNPI's North Toronto terminal. One is TNPI's 273.1 mm outside diameter mainline; the other is a 219.1 mm outside diameter pipeline leased from Sun-Canadian Pipe Line Company Limited. At Cummer Junction, the flow of product is directed to either the DVL or continues east on TNPI's mainline. Cummer Junction contains two diversion valves and sending and receiving traps for internal inspections, as well as numerous other valves.

When first constructed in 1952, the DVL supplied many terminals in the South Toronto harbour area and delivered a full slate of distillates and gasolines on a year round basis. At that time, TNPI was one of three pipeline companies delivering refined petroleum products down the Don Valley to what was then the main refined petroleum products distribution area for Metropolitan Toronto. Over the years, terminal distribution facilities in the harbour area were relocated and, by 1992, the other two pipelines had been taken out of service.

Currently, the DVL is used to deliver furnace fuel oil and diesel fuel to a terminal owned by Roy-L. Roy-L's terminal is located on the south side of the shipping channel in the Port of Toronto and receives deliveries via its own 0.64 kilometre pipeline extending from its terminal to TNPI's Toronto Harbour meter station.

TNPI submitted that, following deactivation of the DVL, cathodic protection and monitoring would continue in accordance with the Board's *Onshore Pipeline Regulations, 1999*. It further submitted that the facilities at Cummer Junction and the leased pipeline section upstream of Cummer Junction would no longer be needed.

Chapter 3

Common Carrier Obligation

3.1 Section 71

As noted by all parties, this was a unique case in that the Applicant is seeking to be relieved of its common carrier obligation in the presence of a shipper who wishes that obligation to continue. The Board requested parties to address in argument the issue of the appropriate test to be applied to the facts of this case. The submissions of the parties focussed on the requirements of section 71.

Section 71 of the Act sets out the obligations of pipeline companies as carriers of oil, gas and other commodities and the authority of the Board in relation to those obligations. Specifically, section 71 states:

71. (1) Subject to such exemptions, conditions or regulations as the Board may prescribe, a company operating a pipeline for the transmission of oil shall, according to its powers, without delay and with due care and diligence, receive, transport and deliver all oil offered for transmission by means of its pipeline.
- (2) The Board may, by order, on such terms and conditions as it may specify in the order, require the following companies to receive, transport and deliver, according to their powers, a commodity offered for transmission by means of a pipeline:
- (a) a company operating a pipeline for transmission of gas; and
 - (b) a company that has been issued a certificate under section 52 authorizing the transmission of a commodity other than oil.
- (3) The Board may, if it considers it necessary or desirable to do so in the public interest, require a company operating a pipeline for the transmission of hydrocarbons, or for the transmission of any other commodity authorized by a certificate under section 52, to provide adequate and suitable facilities for
- (a) the receiving, transmission and delivering of the hydrocarbons or other commodity offered for transmission by means of its pipeline,
 - (b) the storage of the hydrocarbons or other commodity, and
 - (c) the junction of its pipeline with other facilities for the transmission of the hydrocarbons or other commodity,

if the Board finds that no undue burden will be placed on the company by requiring the company to do so.

Submissions of TNPI

TNPI acknowledged that it is a common carrier and bound by the terms of section 71 of the Act. While noting that section 71 imposes statutory obligations to provide service, it argued that those obligations are relative rather than absolute and should be tempered by a test of reasonableness. In support of this position, TNPI referred to the Board's MH-4-96¹ decision and the decision of the Supreme Court of Canada in *Patchett & Sons Limited v. Pacific Great Eastern Railway Co.*²

In respect of whether the proposed suspension of service on the DVL would be in the public interest, TNPI submitted that subsection 71(3) of the Act was designed to balance the duties of a common carrier with the well being and interests of the public. TNPI argued that, as reasonableness is a relative concept, the provisions imposing common carrier obligations must be considered within the circumstances of each case.

Submissions of Enbridge Pipelines Inc.

Enbridge Pipelines Inc (Enbridge) argued that the Board ought to continue to apply a test of reasonableness, which is a relative concept, fact dependent and consistent with the approach taken in MH-4-96. Enbridge noted that, although the issue in MH-4-96 was related to obtaining access to the Enbridge system and the present case is one of discontinuance, the same test and same factors of reasonableness need to be considered. In its view, the approach most consistent with that described in the MH-4-96 proceeding would be for the Board to weigh all such facts and then exercise its discretion to make and determine whether the public interest would be served by allowing the discontinuance of the transportation service.

Submissions of Roy-L

Roy-L framed the issue before the Board as: Are there sufficient reasons in the public interest why TNPI, being a common carrier, should be relieved of this obligation under subsection 71(1) of the Act to provide common carrier service on the DVL to shippers who request such service?

Roy-L argued that the test to be applied is whether the continuation of the common carrier obligation places an undue burden on the oil pipeline company. The basis for this conclusion was two fold. First, it arises from the undue burden test contained in subsection 71(3). Since the Board has been given the jurisdiction under this subsection to order a pipeline company to build new facilities, unless it would be placed under an undue burden, it follows that a test of applying the same threshold should be applicable to the common carrier obligation.

¹ PanCanadian Petroleum Limited, Reasons for Decision dated February 1997

² [1959] S.C.R. 271 at 3.

Secondly, the Board has attached this undue burden test to the common carrier obligation in at least two of its decisions, OH-2-96¹ and OH-3-96². Roy-L characterized the test as: Has TNPI provided sufficient evidence to demonstrate that an undue burden will be placed upon it if it is required to provide service on the DVL?

Roy-L agreed with TNPI's submission that the obligations of the statutory carrier in respect of both service and facilities are tempered by a test of reasonableness stating that to impose an undue burden upon a company would clearly be unreasonable and that premise is implicit in the undue burden test.

Reply by TNPI

TNPI contended that when the Board is considering whether to force the common carrier obligation, there is an overriding concern of reasonableness, in addition to and exclusive from subsection 71(3) which deals with undue burden.

Views of the Board

The Board has considered the common carrier obligation in a number of previous decisions³ which were referred to by parties in argument. However, the Board is of the view that the provision imposing common carrier obligations must be considered within the circumstances of each case.

In the MH-4-96 proceeding, the Board was faced with an application by PanCanadian Petroleum Limited (PanCanadian) for access to the existing Interprovincial Pipe Line Inc. (now Enbridge) system for natural gas liquids delivery. The issue of the test to be applied in enforcing the common carrier obligation was squarely before the Board in that case. In reaching its conclusion that Enbridge was required to provide PanCanadian with access to its system, the Board discussed the common carrier obligation at some length.

The Board stated in its MH-4-96 decision at page 11:

Regulatory statutes such as the NEB Act must be applied along with the common law where there is no apparent conflict between the statute and the common law.

The Board went on to say:

Nevertheless, the Board remains cognizant of the fact that statutory service obligations which are imposed by law on regulated undertakings are relative, rather than absolute, obligations. Thus, tribunals and courts have consistently ruled that the obligations of a statutory carrier in respect of both service and facilities are tempered by a test of reasonableness.

¹ Novagas Clearinghouse Pipelines Ltd., Reasons for Decision dated May 1997

² Federated Pipe Lines (Northern) Ltd., Reasons for Decision dated April 1997

³ MH-4-96, OH-2-96 and OH-3-96

In support of this approach, the Board referred to the *Patchett* case, *supra*, and stated:

The importance of the approach articulated in the case law is that compliance with the common carrier provisions is determined by a test of reasonableness, which is a relative concept. Section 71 of the NEB Act is consistent with this common law approach because it permits the Board to tailor the statutory obligations of both oil and gas pipelines to fit any unique circumstances which may exist. Thus, the Board can increase or decrease the statutory common carrier obligations of an oil, gas or commodity pipeline in respect of their carriage of oil, gas or another commodity.

The OH-2-96 and OH-3-96 proceedings were applications pursuant to section 52 of the Act for certificates to construct and operate pipelines. One of the questions raised by intervenors in these cases was whether potential shippers would have full and open access to the pipeline, if the pipeline were approved and constructed. The Board briefly discussed the common carrier obligation reflected in subsection 71(1) in this context and referred to the Board's decision in MH-4-96 on this issue. The Board stated:

Subsection 71(1) generally reflects the common law interpretation of common carrier obligations in respect of oil pipelines. An oil pipeline must receive and transmit all oil offered for transmission by means of its pipeline, if the Board finds that no undue burden will be placed on the company by requiring the company to do so.

In OH-2-96 and OH-3-96, the Board did not discuss the test of reasonableness as set out in MH-4-96. However, unlike the MH-4-96 proceeding, the Board was not required in those two cases to reach a conclusion as to the appropriate test to be applied in enforcing the common carrier obligation. In both of those cases the Board only dealt with the issue in passing and it was satisfied that the common carrier obligations under subsection 71(1) would be met.

Subsection 71(1) requires a company operating a pipeline to receive, transport and deliver all oil offered for transmission subject to any exemptions, conditions or regulations as the Board may prescribe. There is no express guidance or limits on the criteria the Board should consider in prescribing any "exemptions or conditions". Notably, there is no reference to the concept of undue burden in this subsection.

Subsection 71(2) extends a common carrier type of obligation to companies operating pipelines for the transmission of commodities other than oil. Again there is no guidance on the criteria which the Board must consider in exercising its authority under this subsection.

Subsection 71(3) gives the Board the authority, if it considers it necessary or desirable in the public interest, to require a company to provide adequate and suitable facilities for the activities set out in paragraphs 71(3)(a), (b) and (c), if the Board finds that no undue burden will be placed on the company by requiring the company to do so.

Roy-L made reference to the purpose of subsection 71(3) in argument and stated:

Since the Board has been given the jurisdiction under this subsection to order a pipeline company to build new facilities, unless it would be placed under an undue burden, it follows that a test of applying the same threshold should be applicable to the common carrier obligation.

The Board notes that Roy-L did not provide any authority for this assertion. However, as Roy-L correctly submitted, this subsection provides the Board with authority to order the provision of new facilities if the Board determines that they are in the public interest *and* there would be no undue burden on the company in providing the facilities. That understanding is consistent with the Board's practice. Nevertheless, subsections 71(1) and (3) have different purposes. Subsection 71(1) provides the statutory obligation of an existing oil pipeline to provide service on its pipeline. Subsection 71(3) on the other hand furnishes the Board with the extraordinary power to order a company to provide new facilities. The additional requirement of determining whether there would be an undue burden on the company prevents the Board from using the public interest as its sole criterion in applying subsection 71(3).

Subsection 71(1) does not contain such a limitation. As subsections 71(1) and 71(3) have different purposes and different wording, Parliament could not have intended that the criteria in subsection 71(3) would be applied in the same manner to the common carrier obligations under subsection 71(1). Rather, in the Board's view, the burden on a company would be one relevant factor to be considered and balanced with any other existing public interest factors in determining what is reasonable in the circumstances.

The Board finds support in this conclusion both in the common law referred to by TNPI and the findings of the Board on this issue in the MH-4-96 decision. For the purposes of this case, the Board is of the view that compliance with the common carrier provisions in subsection 71(1) should be determined by a test of reasonableness, which permits the Board to tailor the statutory obligations of an oil pipeline to fit any unique circumstances that may exist.

3.2 Proposed Suspension of Service

Overview

TNPI proposed to suspend operation of the DVL because deliveries via the lateral have declined to a point where its cost of operation greatly exceeds revenue derived from tolls. In its view, operation of the DVL was uneconomic and had become a financial burden on the company and its shippers.

Roy-L asserted that the requirement to provide continued service on the DVL did not impose an undue burden on TNPI. It based this assertion on the overall financial health of TNPI, the negligible effect the operation of the DVL has had on its profits and tolls and the absence of any evidence that operation of the DVL has placed TNPI at a competitive disadvantage. Roy-L also pointed to the absence of other shippers at the hearing as an indication that they were not concerned with the cost of operating the DVL.

Costs

TNPI estimated that it incurs costs in excess of \$500,000 per year to operate the DVL while it receives only \$70,000 per year from tolls. TNPI submitted that the cost of operating the DVL in 1999 was \$521,211. TNPI estimated that \$156,504 of this amount could be eliminated following deactivation and a further \$125,557¹ could be saved following abandonment of the DVL.

TNPI stated that, as well as this annual cost, it would have to bear additional costs for increased right-of-way rents and leases and capital renewals over the next few years. It identified maintenance expenses of \$212,000 that would have to be undertaken in 2001 and 2002, including \$150,000 for an internal inspection in 2002, and further capital expenditures of \$240,000 that would be required by 2010. TNPI also submitted that it may have to purchase an easement in order to retain its right of way in a section of the DVL located on land currently leased from Canadian National Railway (which intends to sell its facilities) and estimated that such an easement could cost between \$200,000 and \$250,000.

In cross-examination, Roy-L disputed TNPI's estimates of the cost savings that could be achieved by terminating service on the DVL. It established that the lease of the 219.1 mm outside diameter pipeline between North Toronto and Cummer Junction had already been terminated in 2000 and, therefore, the expense of approximately \$47,000 associated with that line would be eliminated in any event. TNPI conceded that the line control expense savings estimated to be \$13,600 in 1999 would decrease to \$7,000 in 2000. Further, TNPI acknowledged that the depreciation expense of approximately \$32,000 may still be recovered in future tolls. After recognizing these adjustments, Roy-L estimated the potential cost savings available to TNPI from suspension of service to be approximately \$71,000 and from abandonment to be approximately \$196,000. These estimated savings and adjustments are highlighted in Table 3-1.

Table 3-1
Expenses Eliminated by Closure of the DVL

	Suspension of Service	Abandonment	Total
TNPI's Estimate	\$156,504	\$125,557	\$282,061
Less: Cancelled Pipeline Lease	\$47,385		\$47,385
Reduced Line Control	\$6,600		\$6,600
Depreciation	\$31,821		\$31,821
Adjusted Estimate ²	\$70,698	\$125,557	\$196,255

¹ This amount combines TNPI's original estimate of \$98,557 and \$27,000 for non-direct maintenance expenses which TNPI estimated could be eliminated within one year.

² The amounts in the table have been adjusted by the Board to incorporate Roy-L's evidence and to remove rounding errors.

Deactivation and Reactivation Costs

TNPI estimated that the cost of deactivation of the DVL was between \$85,000 and \$95,000 and that the annual cost of maintaining the pipeline in a deactivated state was \$99,000. It estimated the cost to reactivate the lateral to be between \$35,000 and \$45,000.

Throughput

Deliveries via the DVL have declined from 231 693 cubic metres in 1985 to 41 636 cubic metres in 1999. TNPI calculated that the 1999 volume represented a utilization rate of 2.2 percent of the DVL's capacity. It estimated that this volume could be delivered through the DVL in 4.3 days and was equivalent to the volume trucked annually to two major gas stations in the City of Toronto.

TNPI stated that it was unlikely that there would be any future growth in pipeline deliveries to the Toronto harbour area and suggested that planned development of the area into recreational, residential and office complexes could preclude the expansion of petroleum distribution facilities in the area. TNPI noted that Roy-L had agreed that the decline in its business would continue and that this decline is consistent with a general decline in the market for furnace fuel oil in the City of Toronto.

Roy-L's forecast of deliveries for the next five years was between 40 000 and 45 000 cubic metres per year. This forecast was consistent with TNPI's evidence.

Impact on TNPI

TNPI indicated that the costs associated with the operation of the DVL have had the effect of increasing its tolls and that higher tolls have put TNPI at a competitive disadvantage vis-a-vis other distribution options available to shippers. TNPI projected that an average 0.3 percent reduction in tolls was achievable in the year following suspension of service.

As a counterpoint to this argument, Roy-L noted that the system as a whole has been operating at between 80 and 90 percent of capacity since 1996 and that no evidence had been provided indicating that any business had been lost due to the level of TNPI's tolls. Roy-L argued that, if operation of the DVL was placing TNPI at a competitive disadvantage, this was nothing new as the lateral had been operating at a loss since at least 1985 and indeed was operating at a loss at the time that Roy-L was accepted as a shipper.

In support of its assertion that TNPI was a very financially healthy company, Roy-L pointed to the high rates of return achieved by TNPI under its incentive toll settlement. Since 1996, TNPI has earned returns that are on average 60 percent higher than the returns allowed pipeline companies subject to the Board's multi-pipeline cost of capital methodology. Further, it asserted that TNPI's earned returns compensate it for throughput risk and for any inherent environmental risks associated with such throughput.

In stressing the minimal impact that the continued operation of the DVL would have on TNPI's earnings, Roy-L noted TNPI's evidence that the cost savings resulting from the proposed suspension of service would increase its earned return on equity from 16.3 percent to 16.5 percent.

TNPI argued that the Board is not compelled to look at the pipeline system as a whole, supporting this view by the fact that the DVL is a completely separate entity from the rest of its system. TNPI advanced that if the DVL is considered on its own, the question of rate of return becomes irrelevant. TNPI also pointed out that, under incentive tolling, any increase in rate of return would reduce tolls the following year and provides an incentive to continuously make the pipeline more efficient, which then benefits shippers and the greater public.

Impact on Roy-L

TNPI argued that Roy-L was opposing the suspension of service to ensure that its business remained subsidized by TNPI and its other shippers. TNPI submitted that the evidence did not support Roy-L's position that, if the DVL goes out of service, Roy-L will cease operations and close its business. TNPI pointed out that Roy-L's core business is purchasing, storing and re-selling products, and submitted that it has nothing to do with transportation and how products were delivered to its terminal. TNPI believed that the extra cost to Roy-L of shipping its product by truck, as opposed to using the DVL, was three-tenths of a cent per litre, which represented an additional cost of \$136,000 per year based on the amount of products presently being shipped to Roy-L. TNPI was of the view that this increase could be passed on to customers because the fuel oil market does not have the flexibility to switch to natural gas quickly. In addition, TNPI noted that marine deliveries to Roy-L's terminal were also possible.

Roy-L rejected the proposition that trucking or marine deliveries were viable alternatives to using the DVL. Roy-L stated that trucking would not enable it to promptly respond to changing market conditions and to capture the price and supply opportunities that it was currently able to obtain as a pipeline-connected terminal operator. Roy-L maintained that, from a business point of view, the issue was not merely paying the additional costs of trucking products to its terminal, but rather the change in the classification of Roy-L as a pipeline-connected wholesaler, trader and terminal operator. This would result in lower profit margins, which could result in Roy-L going out of business. Roy-L calculated that, between September 1999 and August 2000, the total cost of its purchases would have increased by \$1.2 million, had it been buying its supplies at rack prices with delivery by truck instead of pipeline.

With respect to marine deliveries, Roy-L presented an expert in marine transport of oil products who stated that, although opportunities may occur from time to time, the purchase of supplies for marine delivery is generally not an economically viable option.

The financial impact of a suspension of service on Roy-L's business was the subject of considerable discussion during the hearing. However, Roy-L argued that whether the Board finds on the evidence that a suspension of service would cause Roy-L to go out of business or that its margins would be impaired does not matter in the context of the specific test to be applied in this case. Rather the issue in Roy-L's view is whether TNPI has provided sufficient evidence to demonstrate that an undue burden will be placed upon it if it is required to continue to provide service on the DVL.

Public Interest

TNPI asserted that the public interest would be served by permitting it to cease operation of the DVL. This was in the interest of its shippers and, in turn, the shippers' customers. TNPI argued that to

encourage and permit the efficient running of pipelines goes to the heart of the Board's mandate for the regulation of oil pipelines.

TNPI established that Roy-L does not sell directly to individual retail accounts. Rather, it sells furnace fuel oil to commercial accounts and independent dealers and diesel fuel to construction and road building clients. Roy-L submitted that, if the DVL is deactivated, its business would become uneconomic and it would have to cease operations and close its business within a short period of time. In Roy-L's view, this would result in a lessening of competition in the market place. Several independent furnace fuel oil dealers who purchase supplies from Roy-L filed letters of comment highlighting their concerns about Roy-L possibly going out of business and the impact that this would have upon competition.

TNPI stated that, in the event service on the DVL was suspended, consumers who currently obtain furnace fuel oil via the DVL would continue to have access to supplies as there are many trucks delivering this oil in Toronto.

TNPI noted that the DVL is located in an "enhanced consequence area" because it traverses the Don Valley Conservation Area which is a major natural recreational area for Toronto and is the site of a major wild bird preserve. TNPI was of the view that, in the unlikely event of a leak occurring on the DVL, there could be very serious environmental and financial costs. TNPI submitted that, if the DVL continues to operate, it would bear an enhanced risk with no opportunity for a reward.

On this issue, Enbridge took the position that it was not the operational risk associated with the DVL that is unacceptable. Rather, it was the financial return associated with the ongoing operation that is unacceptable to TNPI.

Roy-L submitted that no weight should be given to TNPI's concerns regarding the environmental risk associated with operation of the DVL. Roy-L pointed to TNPI's evidence that the DVL is maintained and operated to the same high standards as the rest of its system and suggested that the risk of a spill was no greater on the DVL than on any other part of the system. As to the financial risk associated with a potential spill, Roy-L noted that TNPI carries insurance for such events. On the other hand, Roy-L argued that any significant increase in trucking resulting from the closure of the DVL would be an unwarranted incremental risk to public safety and the environment.

Views of the Board

The Board heard opposing arguments from TNPI and Roy-L on whether it should consider either the economic viability of the DVL on its own or as part of the entire TNPI system. The Board notes that the DVL is a distinct entity to which definite costs can be assigned within the TNPI system and that the system can clearly operate with or without the presence of the lateral. Consideration of the financial impact of the DVL on the entire company would be mainly indicative of its relative size and would provide little insight as to whether maintaining the operation of the DVL is reasonable. Thus the Board is of the view that consideration of the economic viability of the DVL on its own is required to reach a decision in this matter. The finding must then be balanced with any public interest considerations that may be present.

The Board notes that the costs of operating the lateral greatly exceed the revenues derived from deliveries to Toronto Harbour. The total annual costs attributed to the DVL exceed \$500,000, while annual revenues from deliveries to Roy-L's terminal are in the range of \$70,000. Further, the evidence of TNPI and Roy-L demonstrates that volumes shipped on the DVL have been declining since 1985 and are not expected to increase significantly in future years.

The Board notes that the projected revenue from tolls is less than the costs that could be avoided by terminating service on the DVL. As summarized in Table 1, at least \$70,000 in annual costs would be avoided following deactivation of the DVL, and a further \$126,000 could be saved following abandonment of the DVL. The economic viability of the DVL is expected to deteriorate further in the near future as a result of anticipated increases in costs and substantial maintenance and capital expenses required to maintain the integrity of the facilities. The Board concludes that continued operation of the DVL is uneconomic and maintaining its operation would require substantial cross-subsidization from other shippers, which would be unreasonable in the circumstances and contrary to the public interest in operating pipelines in an economically efficient manner.

The Board heard discussion from TNPI and Roy-L on the impact that a suspension of service on the DVL would have on Roy-L. The Board is of the view that the effect of a proposed suspension of service on the viability of an individual shipper's business or existing approach to that business is a factor that may be weighed in relation to the overall public interest when applying a test of reasonableness. In this case, however, little weight has been attributed to this factor as there was no persuasive evidence to suggest that such an outcome would have any appreciable negative impact on the broader public interest.

From the evidence, it is clear that consumers of furnace fuel oil would continue to have access to supplies at fair market prices, given the presence of several retailers in the greater Toronto market. The evidence further showed that if trucking were to be used to carry the volumes currently transported on the DVL, there would be no significant increase in truck traffic within the Toronto area. Overall, in the Board's view, the general public would not be inconvenienced to any significant degree by closure of the DVL.

After balancing the unique circumstances of this case, the Board has concluded that it would be unreasonable to require TNPI to continue operation of the DVL in the presence of the continuing economic burden on TNPI and its shippers. Therefore, the Board is of the view that it would be in the public interest to grant TNPI relief from its obligations pursuant to subsection 71(1).

Chapter 4

Timing and Other Considerations

4.1 Timing

TNPI proposed to suspend service effective 1 January 2001. TNPI stated that it provided notice to its shippers on 15 February 2000 of this intention to enable shippers ample time to analyse and plan for alternate transportation, although it would have preferred to effect an immediate closure. Further, TNPI argued that any mandated operation of the DVL beyond 1 January 2001 should be under a toll which reflected its full costs.

Roy-L did not suggest any alternative date for a suspension of service on the DVL. Roy-L also argued that there was no basis to change tolls on the DVL after 1 January 2001, as there was no toll application pursuant to Part IV of the Act before the Board.

A letter of comment from NOVA Chemicals (Canada) Ltd., a supplier of products to Roy-L, requested that any suspension of service not occur prior to the end of the heating season, on or about 30 April. The Board also received letters of comment from several distributors of furnace fuel oil which stressed their reliance upon Roy-L for competitively-priced supply.

Views of the Board

The Board is mindful that closure of the DVL may require parties to alter their arrangements for supplies of furnace fuel oil. Therefore, the Board finds it is in the public interest to minimize the potential for such disruptions during the peak of the heating season. In the circumstances, the Board considers that, to accommodate a reasonable transition, any suspension of service on the DVL should not occur before 1 April 2001 and only upon 60 days notice to TNPI's shippers and the Board.

As for the request by TNPI concerning the toll to be charged for shipments on the DVL in 2001, the Board notes that this was not a toll proceeding and that the record does not provide any support for alteration of its existing toll design.

4.2 Other Considerations

In its intervention, the Toronto and Region Conservation Authority (TRCA) requested that, in the event the Board were to allow suspension of service on the DVL, it should establish clear requirements for TNPI to provide a "high standard of rehabilitation in recognition of the current conditions within the valley system, and in accordance with the requirements under Ontario Regulation 158". The TRCA also requested that TNPI be directed to work with it, the City of Toronto and other groups to ensure this work is carried out in accordance with the policies of the Valley and Stream Corridor Management Program, the City of Toronto and the report of the Don Watershed Task Force, "Forty Steps to a New Don".

The Board acknowledges the concerns raised by the TRCA but notes that these issues were outside the scope of the current proceeding. However, these issues would be relevant in any subsequent application to the Board regarding deactivation or abandonment, as detailed below.

Deactivating, Selling, Leasing or Abandoning the DVL

Following a suspension of service on the DVL and related facilities, TNPI may file an application for deactivation with the Board, if applicable, pursuant to section 44 of the *Onshore Pipeline Regulations, 1999*. Section 44 states:

44. (1) If a company proposes to deactivate the pipeline or a section of it for 12 months or more or has maintained the pipeline or a section of it in a deactivated mode for 12 months or more or has not operated the pipeline or a section of it for 12 months or more, the company shall submit an application for the deactivation to the Board.
- (2) The application shall include the rationale for the deactivation and the measures to be employed or that were employed for the deactivation.

The goal of section 44 is to ensure that the deactivation of a pipeline is carried out in a safe and environmentally responsible manner. The Board also notes that any suspension of service or deactivation must be carried out in compliance with the requirements of the Canadian Standards Association standard *CSA Z662-99, Oil and Gas Pipeline Systems*.

Should TNPI wish to proceed with selling, leasing or abandoning the DVL and related facilities, an application would be required pursuant to section 74 of the Act. An application for abandonment must include the information set out in the Board's *Guidelines for Filing Requirements*. The Board expects that input would be obtained from all stakeholders, including landowners and the affected public, and be reflected in a company's abandonment plan.

Chapter 5


Disposition

The Board finds that, on balance, it is reasonable in the circumstances to grant the relief from subsection 71(1) requested by TNPI, to be effective on or after 1 April 2001, on the condition that TNPI provides no less than 60 days written notice of its intended date of suspension of service on the DVL to its shippers and the Board.

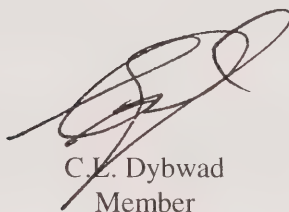
The foregoing and Order MO-22-2000 constitute our Reasons for Decision in this matter.



J.S. Bulger
Presiding Member



J.-P. Théorêt
Member



C.L. Dybwad
Member

Calgary, Alberta
November 2000

Appendix I

Order MO-22-2000

IN THE MATTER OF the *National Energy Board Act* (Act) and the regulations made thereunder; and

IN THE MATTER OF an application by Trans-Northern Pipelines Inc. (TNPI), pursuant to section 71 of the Act and filed with the National Energy Board (Board) under file 4775-T2-1, for a suspension of service on a portion of its system known as the Don Valley Lateral.

BEFORE the Board on 23 November 2000.

WHEREAS TNPI notified its shippers and the Board on 15 February 2000 of its intention to suspend service on the Don Valley Lateral effective 1 January 2001;

AND WHEREAS TNPI provided details of its proposal in letters dated 11 and 26 May 2000;

AND WHEREAS Roy-L Canadian Fuels Co. Ltd. by letter dated 28 July 2000 requested the Board to require TNPI to apply for approval prior to implementing any suspension of service;

AND WHEREAS the Board deemed TNPI's letters of 11 and 26 May 2000 to be an application and issued Order MH-3-2000 on 15 August 2000 to convene an oral public hearing to consider the proposed suspension of service pursuant to section 71 of the Act;

AND WHEREAS the Board has examined the application and the evidence and arguments presented by TNPI and intervenors, and considers it to be in the public interest to grant, in part, the relief requested in the application;

AND WHEREAS the Board considers that, pursuant to subsection 19(1) of the Act, the effective date of this order should be no earlier than 1 April 2001;

IT IS ORDERED THAT:

Pursuant to sections 12 and 13 and subsection 71(1) of the Act, TNPI is granted relief from its obligations pursuant to subsection 71(1) of the Act, to receive, transport and deliver all oil offered for transmission on the Don Valley Lateral; and

Pursuant to subsection 19(1) of the Act, this order shall come into effect on or after 1 April 2001, upon 60 days written notice to TNPI's shippers and the Board, of the intended date for suspension of service, upon the following condition:

Unless the Board otherwise directs, this order shall expire on 31 December 2001, unless TNPI has suspended service on the Don Valley Lateral by that date.

NATIONAL ENERGY BOARD

Michel L. Mantha
Secretary

Appendix II

MH-3-2000 List of Issues

The Board has identified, but does not limit itself to, the following issues for discussion during this proceeding:

1. Whether the proposed suspension of service on the Don Valley Lateral is in the public interest.
2. Whether the provision of adequate and suitable facilities for the receiving, transmission and delivery of oil on the Don Valley Lateral places an undue burden on Trans-Northern.
3. ^f Whether the proposed suspension of service should be effective 1 January 2001 or some other date.
4. The appropriate terms and conditions to be included in any approval which may be granted.

